

Ms. La opposes this motion on the basis that the FAC pleads sufficient facts to support venue in the Southern District of California. In addition, Ms. La states facts to support a claim for securities fraud under federal and state law, account stated and common law fraud, as discussed more fully herein.

II.

STANDARD OF REVIEW

A. Standard of Review for Motion for Change of Venue Pursuant to Federal Rule of Civil Procedure, Rule 12(b)(3):

In the Ninth Circuit, a motion to dismiss based on a forum selection clause is treated as a motion to dismiss for improper venue under Federal Rule of Civil Procedure, Rule 12(b)(3); see also American Home Assurance Co. v. TGL Container Lines, Ltd., (ND Cal 2004) 347 F Supp2d 749. Thus, in determining the motion to dismiss, the court need not accept the pleadings as true, and may properly consider facts outside the pleadings. Argueta v. Banco Mexicano, S.A., (9th Cir 1996) 87 F3d 320, 324. However and importantly, the trial court must draw all reasonable inferences and resolve all factual conflicts in favor of the non-moving party, the Plaintiff in this case, Grace La. Murphy v. Schneider Nat'l, Inc., (9th Cir 2004) 362 F.3d 1133, 1138.

Counsel may submit written materials outside of the pleadings, such as sworn affidavits and exhibits, for the court to consider in ruling on a motion to dismiss for improper venue. Argueta v. Banco Mexicano, S.A., 87 F3d 320, 324; Murphy v. Schneider Nat'l, Inc. 362 F.3d 1133, 1137. Submitting written materials does not transform the motion to dismiss into a motion for summary judgment, however, under Rule 56. Argueta v. Banco Mexicano, S.A. at 324. A different standard applied to a Motion to Dismiss pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6), which is discussed in further detail below.

B. Standard of Review for Motion to Dismiss Pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6):

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6), the court may only examine the four corners of the complaint. Raber v. Osprey Alaska, Inc., (1999, MD Fla) 187 FRD 675, 677; cites to Rickman v. Precisionaire, Inc., (1995, MD Fla) 902 F. Supp.

232,233. A motion for failure to state a claim is not a procedure for resolving a contest about the facts or merits of the case. Neilson v. Union Bank of Cal., N.A., (CD Cal 2003) 290 F Supp2d 1101, 1151. Dismissal for failure to state a claim is appropriate only when the plaintiff can prove no set of facts supporting relief. Guerrero v. Gates, (9th Cir 2004) 357 F3d 911, 916. Accordingly, the motion is viewed with disfavor and is rarely granted. Gilligan v. Jamco Dev. Corp., (9th Cir 1997) 108 F3d 246, 249; Gallardo v. DiCarlo, (CD Cal 2002) 203 F Supp2d 1160, 1164-1165.

In this case, the Plaintiff has plead sufficient facts to support each of its causes of action, as shown in Section III of these points and authorities. Ordinarily, dismissals for failure to state a claim under Rule 12(b)(6) should be without prejudice to the plaintiff's ability to file an amended pleading. Balistreri v. Pacifica Police Department, (9th Cir 1988) 901 F.2d 696, 701. Dismissal without granting leave to amend is proper only in extraordinary cases. Broam v. Bogan, (9th Cir 2003) 320 F.3d 1023, 1028. Thus, a district court should grant leave to amend if it appears at all possible that the plaintiff can correct the defect. Balistreri v. Pacifica Police Department, at 701. Here, importantly, the Defendant has not raised any objections to Causes of Action for Breach of Contract (Second Cause of Action), for Negligent Misrepresentation (5th Cause of Action), Rescission for Sale of Securities (Eighth Cause of Action), for Accounting (9th Cause of Action), Breach of Fiduciary Duty (10th Cause of Action) or Declaratory Relief (11th Cause of Action). So the motion to dismiss is limited to the 1st, 3rd, 4th, 6th and 7th causes of action. As will be shown, the motion as to these causes of action must fail and Plaintiff does not believe that any amendment of the First Amended Complaint is required.

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a motion to dismiss under Federal Rule of Civil Procedure, Rule 12(b)(6); See also Lee v. City of Los Angeles, (9th Cir 2001) 250 F3d 668, 688. Thus, if the court considers matters outside the pleadings, it must treat the motion as one for summary judgment. See Federal Rule of Civil Procedure, Rules 12(b) and 56. The pleadings include any properly submitted attachments. Wan v. Commercial Recovery Systems, Inc., (ND Cal 2005) 369 F. Supp.2d 1158, 1161. Here, Defendants allege many facts not included in the FAC, none of which should be considered in evaluating Defendants' Rule 12(b)(6) motion to dismiss. Specific objections to Defendants' newly

1 plead “alleged” facts are stated in the Objections to Evidence filed concurrently herewith.

2 If a party presents the district court with matters outside the pleadings that the court does not
3 exclude, it must treat the motion to dismiss as one for summary judgment. See Federal Rule of Civil
4 Procedure, Rule 12(b), 56. On conversion of a motion to dismiss under Rule 12(b)(6) to a Rule 56
5 motion, the court must give all parties a reasonable opportunity to present material pertinent to a
6 motion for summary judgment. See Federal Rule of Civil Procedure, Rules 12(b) and 56.

7 A Rule 12(b)(6) motion to dismiss supported by extraneous materials cannot be regarded as
8 one for summary judgment until the district court acts to convert the motion. The preferable method
9 of “acting” is for the court to make an explicit ruling that it will exclude extraneous materials from
10 its consideration. Swedberg v. Marotzke, (9th Cir 2003) 339 F3d 1139, 1146. In the event that
11 Court elects to consider extraneous facts plead in its motion, Ms. La respectfully requests an
12 opportunity to conduct additional discovery so that she may further respond to this motion as a
13 Motion for Summary Judgment and submit declarations that can rebut each of the contentions raised
14 by Defendant Allen in his Declaration of June 18, 2008.

15 III.

16 STATEMENT OF FACTS

17 Ms. La alleges in her FAC that the Court has original and diversity jurisdiction of the present
18 lawsuit. (FAC ¶¶ 1 through 6). Diversity jurisdiction exists by virtue of the fact that at all relevant
19 times, Ms. La was was citizen of the city of San Diego, state of California; (FAC ¶ 1); Defendant
20 Forever Diamonds, a business entity of unknown origin, was a citizen of Nevada, with its principal
21 place of business in the state of Nevada. (FAC ¶ 3); and Defendant Andra Leonard Allen (“Allen”)
22 an individual, was a citizen of the state of Texas. (FAC ¶ 2) In addition, Ms. La alleges that the court
23 has original jurisdiction under 28 U.S.C. § 1332, in that it is a civil action between citizens of
24 different states, in which the amount in controversy, exclusive of interest and costs, exceeds the
25 amount of Seventy Five Thousand and No/100 Dollars (\$75,000.00). (FAC ¶ 4) Original jurisdiction
26 exists because Ms. La’s claim for relief arises under the Securities Act of 1933 and the Security
27 Exchange Act of 1934. (FAC ¶ 5(a)) In addition the court has supplemental jurisdiction pursuant
28 to 28 U.S.C. § 1367. (FAC ¶ 5(b))

1 Ms. La also alleges in her FAC that “venue is proper under 28 U.S.C. § 1391(a)(2) and (b)(2)
 2 based upon the fact that a substantial part of the events or omissions giving rise to the claims
 3 occurred in this state of California and the penultimate action by the Defendant occurred in this
 4 district, as more fully discussed herein, when Defendant failed to repay and account to Plaintiff for
 5 her monies after demand by her attorney in San Diego, California. (FAC ¶ 9)

6 From at least October 6, 2006, while Defendant Allen lived and worked in San Jose,
 7 California, he repeatedly solicited business in California on behalf of Forever Diamonds by handing
 8 out business cards to members of the public. (FAC ¶ 12) As a result of these solicitations for
 9 business, Allen, on behalf of Forever Diamonds, accepted jewelry business, including but not limited
 10 to jewelry repair work, from citizens of the state of California. (FAC ¶ 12). Defendant Allen
 11 transacted business in the State of California and resided in the State as alleged in the First Amended
 12 Complaint.

13 On or about February 5, 2007, Ms. La entered into an oral agreement with Defendant Allen,
 14 who represented that he had the authority to act as an agent for Defendant Forever Diamonds. (FAC
 15 ¶ 13) Pursuant to the terms of the agreement, Ms. La agreed to invest a total sum of One Hundred
 16 Five Thousand and No/100 Dollars (\$105,000.00) in Forever Diamonds. (FAC ¶ 13)

17 Sometime prior to February 5, 2007, Defendant Allen made the following misrepresentations
 18 of material facts to Ms. La to induce her to invest in Forever Diamonds, while the Plaintiff was in
 19 California: (1) Allen offered to sell Ms. La an ownership interest in Forever Diamonds in exchange
 20 for Ms. La paying him a total sum of One Hundred Five Thousand and No/100 Dollars
 21 (\$105,000.00). (FAC ¶ 14) When Allen made these representations on behalf of Forever Diamonds,
 22 he had no intention of ever giving Ms. La documented proof of her ownership interest in Forever
 23 Diamonds. (FAC ¶ 14). Defendant Allen was doing business in the State of California, as has been
 24 plead both in San Jose and in San Diego.

25 Furthermore, Allen represented to Ms. La that investing in Forever Diamonds would be a
 26 sound investment decision for her. (FAC ¶ 14) Allen informed Ms. La that she would begin to see
 27 a profit from her investment by July 2007 and then no later than January 2008. This offer to share
 28 profits made to Plaintiff, constitutes a security under both California law and federal law (FAC ¶ 14)

1 Allen's statements to Ms. La were misleading because when he made them, Allen never intended
2 for Ms. La to realize a profit based upon her investment in Forever Diamonds. (FAC ¶ 14) In
3 addition, Defendant Allen failed and refused to pay back the monies received by him from Plaintiff
4 after demand was made by Plaintiff's attorneys in San Diego.

5 Finally, when Allen solicited Ms. La to purchase an ownership interest in Forever Diamonds,
6 he never provided her with a prospectus or informed Ms. La of her right to review a prospectus.
7 (FAC ¶ 14) Allen never intended to give Ms. La any profits from her investment in Forever
8 Diamonds. (FAC ¶ 14)

9 Defendants, for the purpose of executing the scheme and artifice to defraud Ms. La of her
10 money, transmitted and caused to be transmitted communications by means of wire or telephone in
11 interstate commerce. (FAC ¶ 16) Such interstate commerce communications included, without
12 limitation, telephone calls between Allen and Ms. La from at least January 17, 2007 through July 6,
13 2007. (FAC ¶ 16) Approximately one week prior to February 5, 2007, while in Texas, Defendant
14 Allen initiated a contact with Ms. La in San Jose, California, via telephone, and requested that she
15 wire him One Hundred Five Thousand and No/100 Dollars (\$105,000.00) for the purpose of Ms. La
16 investing in Forever Diamonds, which Ms. La did. (FAC ¶ 16). This telephone call into California
17 by Defendant constituted additional allegations of Defendant doing business in California.

18 As an officer and/or agent of Forever Diamonds, Defendant Allen owed Ms. La a duty to
19 disclose the truth. (FAC ¶ 17) Allen held himself out to Ms. La to be a savvy businessman,
20 knowledgeable of the wholesale jewelry business. (FAC ¶ 18) Allen also claimed that he
21 represented Plaintiff's financial interests. (FAC ¶ 18) Ms. La reasonably and justifiably relied upon
22 Allen's representations. (FAC ¶ 18)

23 On February 5, 2007, in reliance upon Defendant Allen's representations, Ms. La wired a
24 total sum of One Hundred Five Thousand and No/100 Dollars (\$105,000.00) from her bank account
25 in San Jose, California to Allen in Texas, per Defendant Allen's request. (FAC ¶ 19) Thereafter,
26 Plaintiff made multiple requests to Allen for written documentation confirming her ownership
27 interest in Forever Diamonds. (FAC ¶ 20) However, to date, Defendants have failed and refused,
28 and continue to fail and refuse to provide Ms. La with any such documentation. (FAC ¶ 20)

1 In addition, on or about November 14, 2006, Ms. La entered into an oral agreement with
2 Defendant Allen, whereby she agreed to loan him Five Hundred and No/100 Dollars (\$500.00) as
3 a personal loan. (FAC ¶ 41) Thereafter, on or about June 29, 2007, Plaintiff entered into an oral
4 agreement with Defendant Allen, whereby she agreed to loan him an additional sum of Five Hundred
5 and No/100 Dollars (\$500.00). (FAC ¶ 41)

6 On or about February 26, 2007, Plaintiff entered into an oral agreement with Defendant
7 Allen, whereby she agreed to and contemporaneously tendered to him Seventy Five Thousand and
8 No/100 Dollars (\$75,000.00) for the purpose of investing it in certificate of deposit on Plaintiff's
9 behalf, in Texas. (FAC ¶ 43) Defendant Allen breached his agreement with Ms. La by failing to
10 invest it on behalf of Plaintiff as he promised. (FAC ¶ 46) Ms. La informed and believes and
11 thereon alleges that Defendant ALLEN failed to deposit the funds in a certificate of deposit; failed
12 to invest the funds on Plaintiff's behalf; and failed to inform Plaintiff of the whereabouts of her
13 money despite repeated inquiries from California.. (FAC ¶ 46)

14 On or about July 28, 2007, and afterward, Ms. La made repeated oral and written demands
15 to Defendant Allen to reimburse her for the two (2) personal loans that she tendered to Allen,
16 totaling One Thousand and No/100 Dollars (\$1,000.00). (FAC ¶ 47) Defendant Allen failed and
17 refused, and continues to fail and refuse to repay the loan amount to Ms. La. (FAC ¶ 47)

18 Clearly, the facts alleged constitute claims by Plaintiff Grace La against Defendant Allen dba
19 Forever Diamonds. It should be noted that the Defendant requested that the Court take notice of his
20 fictitious name statement filed in Las Vegas, Nevada. That form, lists Defendant Allen as the
21 "President" of Forever Diamonds. This statement tends to corroborate the allegations of Plaintiff
22 concerning the offer of "shares or equity" in the business. He make statements in public records
23 implying that the business was a corporation.

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IV.

LEGAL DISCUSSION

A. Venue is Proper:

I. Standard of law for Venue Selection:

Despite Defendants' contentions, venue is proper in the Southern District of California. A plaintiff is not obligated to file an action in the most convenient forum, only in a proper forum. See Newton v. Thomason, (9th Cir 1994) 22 F3d 1455, 1463-1464. Where a complaint invokes both diversity and federal question jurisdiction, as stated in the FAC, venue is governed by the rules in federal question cases. See 28 USC § 1391(b). Except as otherwise provided by special venue rules, venue in federal question cases is proper in the following judicial districts:

- (1) if all defendants reside in the same state, a district where any defendant resides. See 28 USC § 1391(b)(1); or
- (2) *a district in which a substantial part of the events or omissions on which the claim is based occurred*, or a substantial part of the property that is the subject of the action is located. See 28 USC § 1391(a)(2), (b)(2) [*Emphasis supplied*]; or
- (3) if there is no district in which the action may otherwise be brought, the district in which any defendant may be found. See 28 USC § 1391(b)(3).

The majority of the events need not have occurred in the State of California and the penultimate act of denying repayment to the Plaintiff and failing to provide an accounting when requested by her attorney occurred in the Southern District of California; the statute requires only that a substantial part of the events occurred in the district. See Meyers v. Bennett Law Offices, (9th Cir. 2001) 238 F.3d 1068, 1075-1076; see also Radical Products, Inc. v. Sundays Distribution, (WD Wash 1992) 821 F Supp 648, 650 [substantial part of events in trademark infringement case occurred in district where confusion between products would occur, even though product was not sold there].

Here, only the subsection (2) of 28 USC 1391(b) applies. Ms. La successfully plead that a substantial part of the events or omission on which the claim is based occurred in San Diego, California in her FAC. Ms. La plead in her FAC that on or about September 2007, Defendant Allen telephoned Plaintiff in San Diego, California, wherein Allen informed Ms. La that he would not

1 return the One Hundred Five Thousand and No/100 Dollars (\$105,000.00) investment in Forever
 2 Diamonds, unless Ms. La agreed to meet in person. (FAC ¶ 24) Ms. La also plead that she informed
 3 Defendant Allen that she did not want to meet in person. (FAC ¶ 24) Ms. La further plead that
 4 Defendant Allen subsequently called Ms. La, via telephone, who was in San Diego, California,
 5 several more times, stating that he intended to come to San Diego to meet with her regarding the
 6 investment in Forever Diamonds. (FAC ¶ 24) Ms. La's causes of action against Defendants accrued
 7 when Ms. La's counsel made both written and verbal demands to Defendant Allen to account for the
 8 monies that he accepted from Ms. La for the purpose of investing on her behalf in Forever Diamonds
 9 and in certificates of deposit. (FAC ¶ 24-26) The telephone conversations and letters from Ms. La's
 10 counsel initiated in San Diego, California. (FAC ¶ 25-26). Defendant Allen has substantial contacts
 11 in the State of California and San Diego for the purposes of venue. Defendant Allen refused to
 12 account for the money or to return it to Ms. La. Therefore, the Southern District of California is a
 13 proper venue for this case to be heard.

14 **ii. Special Venue Rules Under Securities Exchange Act of 1934:**

15 Moreover, under the Securities Exchange Act of 1934, venue is proper in any district *where*
 16 *any act or transaction constituting the violation occurred* or where the defendant is found, is an
 17 inhabitant or transacts business. See 15 U.S.C. § 78v; 15 U.S.C. § 78aa [*Emphasis Supplied*].
 18 Defendants contend that Plaintiff has not shown that Defendants conducted business in San Diego
 19 or that any acts relating to Plaintiff's allegations occurred in San Diego. (Defendants' P&As, 6:2-3)
 20 This is untrue. The FAC clearly states:

21 "23. On or about September 2007 **ALLEN telephoned Plaintiff in San**
 22 **Diego, California.** During the discussion, ALLEN informed Plaintiff that he
 23 would not return the One Hundred Five Thousand and No/100 Dollars
 24 (\$105,000.00) investment in FOREVER DIAMONDS, unless Plaintiff agreed
 25 to meet with him in person. Plaintiff stated that she did not want to meet in
 26 person. Subsequently, **ALLEN called Plaintiff via telephone, in San**
 27 **Diego, California, several more times, stating that he intended to come**
 28 **to San Diego to meet with her regarding the investment.**

24. On or about December 20, 2007, **Plaintiff's counsel of record, Charles**
B. Christensen, mailed ALLEN a letter from San Diego, California, to
FOREVER DIAMOND's principal place of business in Las Vegas,
Nevada, demanding repayment of the monies that ALLEN purportedly
invested on Plaintiff's behalf.

1 25. Thereafter, on two (2) separate occasions, ALLEN contacted
 2 Plaintiff's counsel by telephone, in San Diego, California, and stated he
 3 would not return the money to Plaintiff." (FAC ¶¶ 23-25 [Emphasis
 supplied])

4 Ms. La's cause of action against Defendants Allen and Forever Diamonds for federal securities
 5 violations accrued when Defendants failed and refused to return her monies after receiving multiple
 6 demands from Ms. La personally and through her counsel of record, from San Diego, California.
 7 Based upon these circumstances, venue is proper in the Southern District of California. Further, the
 8 failure to return the money invested upon demand made from San Diego was the penultimate action
 9 that will impose liability upon Defendant Allen, who did business in all of California, including San
 Jose and San Diego.

10 **B. In the Event that the Court Finds that Venue is Improper, Plaintiff Respectfully**
 11 **Requests Transfer to an Alternative Venue:**

12 Transfer is proper when the court finds it to be in the interest of justice. See 28 USC §
 13 1406(a); Abrams Shell v. Shell Oil Company, (CD Cal 2001) 165 F Supp.2d 1096, 1103. Generally,
 14 it is preferable to transfer the case rather than to dismiss it altogether. Abrams Shell v. Shell Oil
 15 Company, 165 F Supp2d 1096, 1103. Under 28 USC § 1406, the court must decide whether it is in
 16 interest of justice to transfer case and two factors courts commonly consider in making this
 17 determination are: (1) convenience of parties and witnesses; and (2) where relevant events took
 18 place. Aluminal Industries, Inc. v Newtown Commercial Associates, (1980, SD NY) 89 FRD 326.

19 Although Ms. La vigorously disagrees with Defendants' assertion that the venue is improper,
 20 should the court make such a determination, Ms. La respectfully requests a transfer in lieu of
 21 dismissal, which is in the sound discretion of the court. See Johnson v. Payless Drug Stores NW,
 22 Inc. (9th Cir 1991) 950 F2d 586, 588, cert. denied, 505 US 1225 (1992).

23 **I. Venue is Proper in the Northern District of California:**

24 Venue is also proper in Northern District of California. The FAC also alleges that a
 25 substantial part of the events or omissions on which the claim is based occurred in the Northern
 26 District of California. Specifically, it states that:

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1 Approximately one week prior to February 5, 2007, while in Texas,
 2 Defendant ALLEN contacted Plaintiff in San Jose, California, via
 3 telephone, and requested that she wire him One Hundred Five Thousand
 4 and No/100 Dollars (\$105,000.00) for the purpose of Plaintiff investing
 in FOREVER DIAMONDS. Thereafter, Plaintiff wired ALLEN the money.
 (FAC ¶ 16 [Emphasis supplied])

5 On February 5, 2007, in reliance upon ALLEN's representations,
 6 Plaintiff wired a total sum of One Hundred Five Thousand and No/100
 Dollars (\$105,000.00) from her bank account in San Jose, California to
 ALLEN in Texas. (FAC ¶ 19 [Emphasis supplied])

7 Furthermore, Defendants admit that the FAC states that: (1) Allen made representations about
 8 Forever Diamonds in San Jose; (2) Ms. La wired her investment from San Jose to Texas; (3) Ms. La
 9 had a conversation with Allen on the telephone while she was in San Jose; (5) Allen flew from Texas
 10 to San Jose, California to have a meeting with Ms. La and did business in San Jose; and (5) Ms. La
 11 loaned Defendant Allen money on two separate occasions in the amount of five hundred and no/100
 12 dollars (\$500.00) for each loan, from San Jose, California. (Defendants' P&As, 4:15-21) Based
 13 upon the facts plead in the FAC and Defendants' acknowledgment that the FAC clearly states that
 14 events relating to the transaction occurred in San Jose, venue is also proper in the Northern District
 15 of California.

16 **ii. This Case Should Not Be Transferred to the Western District of Texas or the**
 17 **District of Nevada:**

18 Defendants propose the United States District of Western Texas and/or the District of Nevada
 19 as alternative venues. However, based upon Forum Non Conveniens, neither district is appropriate.
 20 Plaintiff's records concerning the wire transfers, the witnesses concerning Defendants business
 21 interests are all in California and the primary contacts are in San Diego, California. The Bank of
 22 America branch from which the wires were initiated are in California. There is no legitimate basis
 23 to transfer the action to the Western District of Texas or the District of Nevada, other than to try to
 24 make the prosecution of this action more difficult for Ms. La.

25 **C. Plaintiff States Valid Claims Against Defendants:**

26 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases.
 27 United States v. Redwood City, (9th Cir. 1981) 640 F. 2d 963,966. In evaluating a 12(b)(6) motion,
 28 the court must accept the complaint's allegations as true and construe them in the most favorable

light to the plaintiff. Concha v. London, (9th Cir. 1995) 62 F.3d 1493, 1500, cert. dismissed, 116 S.Ct. 1710 (1996). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Department, (9th Cir. 1990) 901 F.2d 696, 699. Courts should not dismiss a complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in supports of his claim which would entitle [the party] to relief." Moore v. City of Costa Mesa, (9th Cir. 1989) 886 F.2d 260, 262(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)), cert. denied, 496 U.S. 906 (1990). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian (9th Cir. 1992) 978 F. 2d 1115, 1118. In testing the complaint's legal adequacy, the court may consider material properly submitted as part of the complaint or subject to judicial notice. Swartz v. KPMG LLP, (9th Cir. 2007) 476 F.3d 756, 763.

Here, the complaint pleads all of its causes of action with sufficient particularity to survive a Rule (12)(b)(6) motion to dismiss. Moreover, Defendant Allen has made filed no objections to a majority of the causes of action plead against him in its motion to dismiss. The specific causes of action are discussed more fully below:

I. Plaintiff States a Cause of Action for Securities Fraud Under Federal and State Law:

Ms. La states a cause of action against Defendants for Securities fraud under the applicable federal and state statutes. The elements of a cause of action for securities fraud are merely as follows: That the Defendant: (1) offered to sell or sold a security in through interstate commerce by making a false statement or making a misleading statement that the purchaser did not know through the exercise of reasonable diligence; and (2) that any persons purchasing the security may sue either in law or in equity in any court of competent jurisdiction to recover the consideration paid, with interest thereon, less any amount of monies received. See 15 U.S.C. § 771. A "security" is defined as:

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1 “any note, stock, treasury stock, security future, bond, debenture, **evidence**
 2 **of indebtedness**, certificate of interest or **participation in any profit-**
 3 **sharing agreement**, collateral-trust certificate, preorganization certificate or
 4 subscription, **transferable share, investment contract**, voting-trust
 5 certificate, **certificate of deposit for a security**, fractional undivided interest
 6 in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege
 7 on any security, **certificate of deposit**, or group or index of securities
 8 (including any interest therein or based on the value thereof), or any put, call,
 9 straddle, option, or privilege entered into on a national securities exchange
 10 relating to foreign currency, or, in general, **any interest or instrument**
 11 **commonly known as a "security," or any certificate of interest or**
 12 **participation in**, temporary or interim certificate for, receipt for, guarantee
 13 of, or warrant or **right to subscribe to or purchase, any of the foregoing.**
 14 See 15 U.S.C. § 77a, subd. (a)(1) [Emphasis supplied]

15 Here all such allegations are made by Ms. La in the First Causes of Action, Counts One and Two.

16 Ms. La has plead all of the required elements including:

- 17 1. the damage and the request for repayment of the sum of One Hundred Five Thousand
 18 and No/100 Dollars (\$105,000.00), plus interest. See FAC, ¶¶ 1 through 4, 8 and 9
 19 (showing the capacity of the Plaintiff and defendants and proper subject matter
 20 jurisdiction and venue. See FAC ¶ 14, the Defendant made false representations to
 21 induce the Plaintiff to invest;
- 22 2. the offer was to sell a security within the meaning of the applicable acts (FAC ¶14);
- 23 3. the material misrepresentations were made with the intent to deceive, by Defendant
 24 (FAC, ¶ 15);
- 25 4. the Plaintiff was induced by the Defendants to transmit her funds to the defendants
 26 into interstate commerce (FAC, ¶ 16).
- 27 5. the Plaintiff in reliance upon the misrepresentations wired One Hundred Five
 28 Thousand and No/100 Dollars (\$105,000.00) to Defendants through interstate
 commerce, by wire. (FAC, ¶ 16).
6. Plaintiff made numerous requests for documentation concerning her investment but
 all were ignored and declined. (FAC, ¶¶17-22);
7. The demand for repayment was made by Plaintiff to Defendants but these demands
 were rejected. (FAC, ¶¶ 24 through 27); and
8. Finally, Plaintiff has alleged that she has been damaged by the sum of One Hundred
 Five Thousand and No/100 Dollars (\$105,000.00), plus interest.

1 All of the elements of the cause of action in Count 1 and Count 2 have been specifically alleged. The
 2 Plaintiff has plead the facts with the necessary specificity to state a claim for violation of the 33 Act
 3 by alleging in Count One that Defendants unlawfully carried through the mails or in interstate
 4 commerce a security for the purposes of sale. The complaint also alleges that a security is a
 5 "participation in any profit sharing agreement". (FAC, ¶ 31). The complaint also alleges damages
 6 and the right to interest as permitted under the act. (FAC, ¶ 33). The Motion to Dismiss on the First
 7 Cause of Action, Count One must be denied.

8 The Motion to Dismiss the Second Count of the First Cause of Action must also be denied
 9 because the elements of the cause of Action for violation of 15 U.S.C. § 771, which sets forth the
 10 elements of the cause of action. Oral offer to sell a security (FAC, ¶ 36); through use of interstate
 11 commerce (FAC, ¶ 36); untrue statements made by the Defendants through interstate commerce
 12 (FAC, ¶¶ 37 and 38) and finally violation of state law as well, California Blue sky laws, California
 13 Corporations Code §§ 25401 through 25404, selling a security as defined in California Blue sky laws
 14 without qualification in the State of California (FAC, ¶ 39). The damage allegation of Count One,
 15 Section 33 was incorporated by reference into this count. For the foregoing reasons the Motion to
 16 Dismiss the First Cause of Action must be denied.

17 **ii. Plaintiff States a Cause of Action for Account Stated:**

18 Any bill may be the subject of an account stated. Trafton v. Youngblood, (1968) 69 Cal. 2d
 19 17, 25. To constitute an account stated, the following facts must appear: (1) At the time of the
 20 statement, an indebtedness from one party to the other existed; (2) a balance was then struck and
 21 agreed to be the correct sum owing from the debtor to the creditor; and (3) the debtor expressly or
 22 impliedly promised to pay the creditor the amount thus determined to be owing. Truestone, Inc. v.
 23 Simi West Industrial Park II, (1984) 163 Cal. App. 3d 715, 725; Withers v. Matthews, (1961) 192
 24 Cal. App. 2d 139, 141. Hence, an account stated is an agreed balance of accounts; an account which
 25 has been examined and accepted by the parties. It implies an admission that the account is correct,
 26 and that the balance struck is due and owing from one party to the other. Perry v. Schwartz, (1963)
 27 219 Cal. App. 2d 825, 829; Truestone, Inc. v. Simi West Industrial Park II, (1984) 163 Cal. App.
 28 3d 715, 725.

Ms. La states a cause of action against Defendants for account stated. The FAC provides in pertinent part that:

“51. On or about July 28, 2007, an account was stated in writing by and between Plaintiff and Defendant ALLEN and on such statement a balance of One Hundred Eighty One Thousand and No/100 Dollars (\$181,000.00) was found due to Plaintiff from Defendant ALLEN, at San Diego, California.

52. Although demanded by Plaintiff from Defendant, no portion of the owed demanded by Plaintiff from Defendant, no portion of the owed sum has been repaid.

53. There is now due, owing, and unpaid from Defendant to Plaintiff the sum of One Hundred Eighty One Thousand and No/100 Dollars (\$181,000.00), together with interest thereon at the rate of seven percent (7%) per annum, from and after February 26, 2007.” (FAC ¶¶ 51-53.)

Here, Ms. La plead all of the necessary facts to state a cause of action for an account stated. For the purpose of this motion, the court must accept the complaint’s allegations as true and construe them in the most favorable light to the plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995). Further under California law, this is what is called a “common count” and is not demurrable under state law. It should be given the same status under federal law. Defendants completely misstate the pleading standard by asserting that their 12(b)(6) motion should be granted because Ms. La’s failed to submit evidence of a loan to Defendants, such as wire transfers or loan statements. Defendants state in pertinent part:

“Plaintiff has failed to provide any semblance of an account stated or any evidence that she in fact loaned Defendant the monies alleged; i.e., evidence of wire transfers or statements of her loan to Defendants. Without integral evidence of an account stated, Plaintiff cannot properly allege such a cause of action and the court must dismiss it outright.” (Defendants’ P&As, 16:20-26.)

Notably, Defendants fail to cite any statutory authority or caselaw to support the claim that such evidence is required in order to state a cause of action for an account stated.¹ Defendants ignore the

¹At best, Defendants’ contention should be brought as an issue for a motion for summary judgment. See Anderson v. Liberty Lobby, Inc. (1986) S.Ct. 2505, 2510 [Case is appropriate for a motion for summary judgment when the nonmovants’ evidence fails to meet the applicable evidentiary standard so that a reasonable trier of facts could not return a verdict in its favor]; See also Cleveland v. Policy Management Systems Corporation (1999) S. Ct. 1597, 1603 [Case is appropriate for a motion for summary judgment if the nonmovant cannot prove an essential element of its case for which it has the burden of proof at trial.]

fact that Ms. La is not required to submit such evidence in her FAC, other than by pleading the necessary elements of the cause of action. Here, Ms. La has satisfied the pleading requirements for an account stated. The fact that she has not yet provided evidence of the loan, at the pleading stage, is immaterial for the purpose of this 12(b)(6) motion. Based upon the foregoing, Defendants' (12)(b)(6) motion must be dismissed.

iii. Plaintiff States a Cause of Action for Misrepresentation/Fraud:

Plaintiff states a cause of action for misrepresentation and fraud. Defendants correctly identify the necessary elements for pleading a cause of action for misrepresentation and fraud, which include: (1) a specific false representation of a material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of the falsity by the person to whom it is made; (4) the intention that it should be acted upon; (5) the plaintiff acts upon it to his damage. FRCP 9(b); See also In re: Suprema Specialties, Inc. Securities Litigation, 438 F.3d 256 (2006); See also, Request for Judicial Notice ("RJN") No. 2 [CACI Jury Instruction No. 1900, which sets forth the elements for fraud.]

However, Defendants ignore the fact that malice, intent, knowledge and other conditions of a person's mind may be alleged generally. Federal Rule of Civil Procedure, Rule 9(b) states in pertinent part:

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. **Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.**" FRCP, Rule 9(b) [Emphasis supplied].

This principal is set forth in one of the cases that Defendants cite to, DiLeo v. Ernst & Young, (7th Cir. Ill. 1990) 901 F.2d 624. Here, the court explained that:

"Federal Rule of Civil Procedure, Rule 9(b) requires the plaintiff to state 'with particularity' any 'circumstances constituting fraud'. Although **states of mind may be pleaded generally**, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story." DiLeo v. Ernst & Young, (7th Cir. Ill. 1990) 901 F.2d 624, 627.

Federal Rule of Civil Procedure, Rule 9(b) must be read together with Federal Rule of Civil Procedure, Rule 8(a) and thus a party alleging fraud is not required to do more than give a short and simple description of the factual basis of the fraud claim. Rosengarten v. Buckley, (1982, DC Md) 565 F. Supp. 193, 196; see also Folsom v Continental Illinois Nat'l Bank & Trust Co., (1986, ND Ill) 633 F Supp 178 [Although Rule 9(b) requires that plaintiff plead time, place, and substance of

1 allegedly false representations, it does not abrogate otherwise liberal pleading standard of Federal
 2 Rule of Civil Procedure, Rule 8(a).]; see also Raber v. Osprey Alaska, Inc., (1999, MD Fla) 187 FRD
 3 675, 680 [FRCP 9(b) should not be read in isolation and should not abrogate concept of notice
 4 pleading; thus, FRCP 9(b) must be read in conjunction with FRCP 8 regarding notice pleading].

5 Defendants claim that Ms. La's failed to plead a cause of action for intentional
 6 misrepresentation with sufficient particularity. This is not true. The allegations in the FAC provide
 7 sufficient detail about conversations between Ms. La and Defendant Allen to satisfy the pleading
 8 requirements for stating a claim for intentional misrepresentation. The FAC states in pertinent part:

9 "On or about February 5, 2007, Defendant ALLEN made the following
 representations to Plaintiff:

- 10 a. Defendant ALLEN stated that he was knowledgeable in the jewelry business;
- 11 b. Defendant ALLEN stated that he held an ownership interest in a company called FOREVER DIAMONDS, located in Carson City, Nevada;
- 12 c. Defendant ALLEN offered Plaintiff an interest in FOREVER DIAMONDS if she gave him a total sum of One Hundred Five Thousand and No/100 Dollars (\$105,000.00);
- 13 d. Defendant ALLEN agreed to invest the money in FOREVER DIAMONDS on Plaintiff's behalf; and
- 14 e. Defendant ALLEN informed Plaintiff that she would begin to see a profit from her investment by July 2007. ALLEN later told Plaintiff that she would begin to see a profit no later than January 2008. In reality, when ALLEN made these representations to Plaintiff he never intended for Plaintiff to realize a profit from her investment in FOREVER DIAMONDS.

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 19 Thereafter, on or about February 26, 2007, Defendant ALLEN made the following representations to Plaintiff:

- 20 a. ALLEN stated that he was knowledgeable in investing money for other persons;
- 21 b. ALLEN claimed that he researched interest rates for certificates of deposit in both California and Texas. ALLEN further informed Plaintiff that she would earn a higher interest rate by investing her money in certificates of deposit in Texas than if she invested in certificates of deposit in California; and
- 22 c. ALLEN offered to invest the money in certificates of deposit and other investment instruments on Plaintiff's behalf in the state of Texas if she gave him a total sum of Seventy Five Thousand and No/100 Dollars (\$75,000.00)

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 24
 25
 26 In addition, on two separate occasions, Defendant ALLEN made the following representations to Plaintiff:

- 27 a. On or about November 14, 2006, Defendant stated that he was short on cash and agreed to repay Plaintiff if she loaned him a total sum of Five Hundred and No/100 Dollars
- 28

- 1 (\$500.00);
 2 b. Thereafter, on or about June 29, 2007, Defendant again stated
 3 that he was short on cash and agreed to repay Plaintiff if she
 4 loaned him an additional sum of Five Hundred and No/100
 5 Dollars (\$500.00).

6 The representations made by Defendant were in fact false in that he never
 7 intended to repay Plaintiff for each loan.

8 When Defendant ALLEN made these representations, he knew them to be
 9 false and made these representations with the intent to deceive, defraud and
 10 induce Plaintiff to act in reliance of these representations in the manner
 11 hereinafter alleged.

12 Plaintiff, at the time these representations were made by Defendant, and at
 13 the time Plaintiff took the actions herein alleged, was ignorant of the falsity
 14 of Defendant's misrepresentations, and believed them to be true. In reliance
 15 of these representations, Plaintiff was induced to and did give Defendant One
 16 Hundred Eighty Thousand and No/100 Dollars to invest on her behalf, plus
 17 One Thousand and No/100 Dollar (\$1,000.00) as a personal loan, to be repaid
 18 to Plaintiff. Had Plaintiff known the actual facts, she would not have taken
 19 such action. Plaintiff's reliance on Defendant ALLEN's representations was
 20 justified because ALLEN held himself out as a financial advisor, investor and
 21 knowledgeable entrepreneur. (FAC ¶ 56-61)

22 Each of the elements of the cause of action has been plead. In the unlikely event that the court
 23 determines that Ms. La has failed to plead sufficient facts to support a cause of action for fraud,
 24 Defendants' requested remedy of dismissing the case is not appropriate. The court in Rosengarten
 25 explained that in the situation where a plaintiff fails to plead sufficient facts to support a cause of
 26 action for fraud, "the appropriate remedy is not the draconian measure of dismissing the claim with
 27 prejudice, but rather to require plaintiff to file an amended complaint setting forth in detail the
 28 circumstances surrounding the alleged fraud." Rosengarten v. Buckley, (1982, DC Md) 565 F. Supp.
 193, 196. Again, Plaintiff Grace La believes strongly that the cause of action for fraud has been
 appropriately plead in great detail. The motion to dismiss must be denied.

22 V.

23 CONCLUSION


24 This court is the appropriate venue to hear the case. Notwithstanding this fact, Ms. La
 25 respectfully requests that in the event the court determines otherwise, it shall transfer the case to the
 26 Northern District of California, rather than dismissing it. In addition, Ms. La has successfully stated
 27 a cause of action for violation of state and federal securities laws, account stated and intentional
 28 misrepresentation. However, in the event that the Court determines that Ms. La fails to state

1 sufficient facts to support a cause of action, Ms. La respectfully requests that the court grant her
2 leave to amend her complaint.

3 Dated: July 28, 2008

Respectfully Submitted,

4 CHRISTENSEN SCHWERTDFEGER
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6 By: 

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